

The ALJ found claimant's average weekly wage to be \$370 and claimant to have a 40 percent functional impairment to the left upper extremity at the elbow. He did not find that claimant had any impairment for an alleged left lower extremity injury, or for a claimed psychological condition.

Claimant believes the Board should find the following: that she met with accidental injury arising out of and in the course of her employment with respondent on March 20, 2009; that her average weekly wage was \$380 per week; that she sustained an injury to her left upper extremity, left lower extremity and suffered a resulting psychological condition that is work-related. Claimant believes the Board should find that she has a 42.5 percent impairment for the scheduled injuries, a 5 percent to the body as a whole for the psychological condition, and an 80.95 percent permanent partial general (work) disability. Claimant argues that she is permanently and totally disabled pursuant to the presumption found in K.S.A. 44-510c(2), which claimant contends is un rebutted by respondent. Finally, claimant believes she is entitled to \$2,326.88 for an underpayment of temporary total disability compensation and should be awarded future medical treatment upon proper application for periodic maintenance of the implanted stimulator device in her left arm.

Respondent argues the Award should be affirmed.

The issues on appeal are:

1. The nature and extent of claimant's disability, and specifically, whether claimant has a psychological condition related to her work injury, and if so whether she is entitled to work disability or is permanently and totally disabled;
2. Whether claimant was underpaid temporary total disability compensation;
3. Claimant's entitlement to future medical treatment and unauthorized medical;
4. Claimant's average weekly wage.

FINDINGS OF FACT

Claimant worked for respondent as a temporary employee and was working in the printing department at Berry Plastics. She had only been working for respondent for four or five days before she was injured. At Berry Plastics, claimant worked on printing machines and in assembly, packaging items for shipment. Claimant was a temporary full-time employee for respondent and every other weekend was scheduled to work overtime. Claimant testified that she worked full-time, 40 hours per week, and earned between \$9.25 and \$9.50 per hour. She was scheduled to work overtime on Saturdays and Sundays, but only worked four to five days before her accident.

On March 20, 2009, claimant was working in assembly, which involves stacking cups and bowls, and sending them through a machine that wraps them in plastic to be packed in boxes and shipped out to stores. She also had to make sure the UPC codes on the bottom of the packages were not chipped or broken and presentable enough to be sold. While performing this work, claimant testified she twisted her left arm at the elbow and felt a pop in her wrist as she was attempting to prevent a one to two foot stack of bowls

from falling. Claimant's shift in assembly ended a few minutes after this incident and she stopped stacking and focused on her cleaning duties, which were to sweep the floors, wipe off tables and put all trash in the trash can. Claimant experienced a slight amount of pain and discomfort while cleaning.

Claimant did not report the incident until the next day because no one was available at the time, and because she began to have difficulty moving her arm. The day after the accident, claimant met with the safety manager and was sent to Lawrence Memorial Hospital, where she met with a nurse practitioner. On March 23, 2009, claimant met with Dr. Michael Geist, at Lawrence Occupational Health Services. X-rays were ordered to rule out a break. In the end, claimant was thought to have a left wrist sprain and was sent to the care clinic. Physical therapy was recommended twice a week for a couple of weeks and she was given Naproxen for pain. This course of treatment was not successful and claimant was sent to Dr. John B. Moore, IV, a hand specialist. Dr. Moore determined the nerves in claimant's hand were not working appropriately and sent her for a nerve test. Claimant testified that the nerve conduction study (NCS) showed mild to moderate damage and surgery was recommended to fix the problem, which was determined to be in claimant's left elbow. Claimant underwent endoscopic carpal tunnel surgery and open cubital tunnel surgery, on August 13, 2009. The carpal tunnel surgery was to make sure that if there were any problems with the hand, the release would help claimant heal faster.

Dr. Moore released claimant and referred her back to Dr. Eidelman, a pain specialist, whom she had met with before the surgery. Dr. Moore released claimant from his care in October 2009. Claimant continued to have difficulty with her grip strength and the mobility in her hand. She felt the surgery did nothing for her hand, but did fix her elbow. Claimant underwent another NCS, which indicated she was worse than before. Dr. Moore recommended another open carpal tunnel procedure. Claimant met with Dr. Hall for a second opinion, at the request of the insurance company. Claimant testified that Dr. Hall also recommended surgery to find the cause of claimant's hand problems.

Claimant underwent a second surgery with Dr. Moore, involving a carpal tunnel release and ulnar nerve release, on September 30, 2010. As result of the two surgeries, claimant regained some mobility and the pain in her elbow stopped. She still had issues moving her fingers and making a fist with her hand, along with burning, tingling and numbness in her wrist and to the tips of her fingers.

Dr. Moore determined that, at some point when claimant twisted her hand to catch the bowls, she tore the muscle in her palm, which separated and grew down over the nerves in her wrist. Dr. Moore removed a chunk of the muscle and cleaned up the carpal tunnel area. As a result of this procedure, claimant gained more mobility in her hand and had less pain. She continued to have limited lifting and gripping ability. She is unable to type for an extended period and has no extended use of her hand. She is unable to lift a gallon of milk.

After more physical therapy, Dr. Moore again released claimant. She continued to see Dr. Eidelman for pain management, for slight numbness and tingling in the pinky finger and down the back side of the hand and fluctuating pain up into the elbow. Claimant also met with Dr. Rosenberg, a neurosurgeon to discuss whether she wanted a neurostimulator implant. Claimant met with Dr. Ravindran Sabapathy, a psychologist, in May 2011 to determine if she could mentally handle a stimulator. Dr. Sabapathy cleared claimant for the device. Claimant alleges she reported to Dr. Sabapathy that she was experiencing feelings of depression and anxiety. However, no records from Dr. Sabapathy's examination were placed into evidence.

Claimant went back to Dr. Rosenberg to have the stimulator placed in the front of her left arm. Claimant testified that the neurostimulator implant has aided in the reduction of the pain in her wrist and arm. However, at the time of the regular hearing, claimant was not utilizing the implant as she was pregnant and was advised she could not have the implant turned on while pregnant. Claimant testified to a resulting increase in her pain up her arm to the elbow. During the regular hearing, claimant discussed her left upper extremity and psychological concerns. There was no mention of any lower extremity pain or complaints during the February 25, 2013, regular hearing.

Claimant is currently working for her husband's entertainment and production company, Ninjalo, answering phones. Ninjalo sells vinyl banner, flyers and tickets for shows.

At the request of her attorney, claimant met with Peter Bieri, M.D., on January 17, 2012, for an examination. Claimant described an injury to her left upper extremity while lifting and twisting materials. She presented with persistent pain in the left upper extremity; marked weakness of grip and decreased active range of motion secondary to the implanted stimulator. She had good, but incomplete, pain relief through the use of a peripheral cord stimulator. Claimant also complained of intermittent numbness and tingling involving the distal left lower extremity, which she reported began "some time after the stellate ganglion blocks." Dr. Bieri found slight tenderness to palpation about the implant and claimant demonstrated nonuniform loss of active range of motion of the left shoulder, secondary to the implant; slight tissue atrophy of the distal left upper extremity; slight to moderate dysesthesia to the light touch from the site of the implant, distal to the level of the wrist; slight to moderate tenderness to palpation of scars at the left wrist and elbow; and claimant's ability to perform repetitive fine and gross motor movements on the left was moderately impaired secondary to weakness and sensory change. Examination results of claimant's lower extremities were normal. Claimant denied any prior injury or illness involving the left upper extremity. Dr. Bieri found nothing in her medical records to indicate any preexisting condition.

Dr. Bieri opined claimant suffered injury to her left upper extremity, in the course of her employment, on March 20, 2009, and diagnosed entrapment neuropathy at the left wrist and elbow. These injuries required multiple surgical interventions and claimant

developed complex regional pain syndrome (CRPS), also requiring an additional surgical intervention, leaving claimant with residual symptomatology. Claimant also underwent stellate ganglion blocks which resulted in a temporary injury to her laryngeal nerve. Claimant's conditions also required the implantation of a peripheral cord stimulator in her left upper arm. This implantation is permanent and is intended to help control claimant's left upper extremity pain. Dr. Bieri went on to diagnose left lower extremity complaints which he opined were the result of the ganglion blocks.

Based on his findings, Dr. Bieri found claimant to be at maximum medical improvement, with claimant's impairments being permanent and stabilized. He went on to assign a 50 percent left upper extremity impairment for residuals of entrapment neuropathy at the level of the left wrist and elbow and chronic pain syndrome and 5 percent impairment to the left lower extremity for dysesthesia, both pursuant to the *AMA Guides*.¹ He felt claimant's impairment to the lower extremity was attributable to residuals of stellate block injection and were, therefore, attributable to the injury in question. Although he had no recollection as to when her lower extremity symptoms developed, i.e., before or at the time of the ganglion blocks, or afterwards. On cross-examination, Dr. Bieri agreed he had no independent memory or recollection that would aid him in determining the cause of the lower extremity symptoms as they may relate to the injections. The need for, and maintenance and replacement of, the stimulator on an indefinite basis is directly attributable to the injury.

Dr. Bieri assigned restrictions limiting unilateral lifting with the left upper extremity to 5 pounds occasionally, with negligible frequent and constant lifting. Shoulder and overhead use on the left is precluded and repetitive gripping and grasping with the left upper extremity should be limited to no more than occasionally. He reviewed the task list provided by vocational expert Dick Santner and opined claimant could no longer perform 13 out of 21 tasks for a 61.9 percent task loss. It is doubtful Dr. Bieri had any recollection of claimant as he described her as a thin, young woman. Five months later, Dr. Prostic described claimant as standing 5 foot 9 inches tall and weighing 260 pounds.

Claimant met with Edward Prostic, M.D., for a court-ordered evaluation, on May 11, 2012. She had complaints of frequent numbness to the left long ring and little fingers, worsened by lying on her left side, weakness of grip, but improving, pain in her left arm not completely relieved with the nerve stimulator and numbness in the left leg. Dr. Prostic examined claimant's neck and upper extremities.

During the examination, Dr. Prostic found no measurable atrophy in her left upper extremity and claimant's range of motion was normal. Claimant was tender about the nerve stimulator. Pinch strength was normal, but grip strength on the left, as compared to

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, 4th ed.

the right was significantly reduced. X-rays indicated similar amounts of mineral in both hands, indicating claimant did not have CRPS or severe disuse atrophy of her left arm.

Dr. Prostin opined claimant sustained injury to her left upper extremity during the course of her employment on March 20, 2009. He found she had considerable treatment for ulnar nerve entrapment at the elbow more than at the wrist and carpal tunnel releases. He found claimant had poor response to treatment and found no evidence of CRPS, other than hypersensitivity to touch. He felt additional treatment would not be beneficial and found claimant to have a 30 percent permanent partial impairment to the left upper extremity pursuant to the *Guides*. Finally, he found claimant unable to return to duties that require forceful or repetitious use of her left upper extremity.

Dr. Prostin testified claimant could not perform 4 out of 21 tasks listed on Dick Santner's task list for a 19 percent task loss.

At the request of her attorney, claimant met with Robert Barnett, Ph.D., for a psychological evaluation, on August 31, 2012. Claimant reported fatigue; unhappiness; reduced enjoyable activities; feelings of worthlessness; nervous and shaky; occasional shortness of breath; frequent sweating; and feeling like she is going crazy. Dr. Barnett noted that claimant was mildly dysphoric and anxious and she described her mood as "very stressed." Claimant admitted to being annoyed or irritated and occasionally having temper outbursts that she has difficulty controlling. Dr. Barnett went on to find that claimant did not appear to be cognitively limited in a manner that would interfere with employment, and showed no difficulty with attention or concentration. He found claimant capable of both simple and complex work tasks.

Dr. Barnett found claimant to have a 30 percent impairment based on the Second edition of the *AMA Guides*. Dr. Barnett opined that claimant presented as a psychologically intact person who did not appear to be suffering from any major mental disease or defect. He did find that she displayed symptoms of depression and anxiety, which appeared to be reactive to her on the job injury.

Dr. Barnett opined claimant would benefit from ongoing psychotherapy with a qualified mental health professional, specifically a licensed psychiatrist. If claimant chose not to participate in treatment, Dr. Barnett opined claimant would, over time, deteriorate into a major depressive disorder.

At respondent's request, claimant met with Kathleen Keenan, Ph.D., for an independent psychological evaluation, on February 11, 2013. Claimant presented as confident, in control and comfortable. She did not appear to be nervous or depressed. Claimant reported not being able to use her peripheral nerve stimulator because she was pregnant with her second child.

Dr. Keenan noted claimant reported not feeling depressed until she realized she couldn't work. Claimant reported a negative attitude about not being able to find work and felt heartbroken she couldn't provide for her son. Claimant's second pregnancy also provided her with challenges. She exhibited some antisocial beliefs and attitudes, but denied being suicidal or homicidal. Her increased pain was making her irritable and angry. Claimant did not reveal the same mental history to Dr. Keenan that she did to the other medical professionals she met with.

Dr. Keenan noted that claimant's personality profile showed her to be superficially charming, but lacked maturity, depth and substance. She indicated claimant may have an inflated sense of self worth, a high need for attention, admiration and entitled expectations. She indicated claimant is willing to do what she needs to in order to meet her own needs. Dr. Keenan indicated this was a narcissistic personality disorder.

Dr. Keenan felt claimant may not be accurately reporting her psychological and physical symptoms, but wanted more evidence to be certain. She also suspected claimant had a narcissistic personality disorder with histrionic traits, but again needed more evidence. She found claimant to have medical conditions of chronic left extremity pain, migraine headaches, allergies; and psychosocial stressors which included a family member with mental illness, financial stress, lack of health insurance, and her workers compensation lawsuit. Dr. Keenan found claimant's functioning to be pretty high with a global assessment score of 71 out of 100.

Dr. Keenan ultimately concluded there is no evidence that claimant is suffering from any psychological problems that can be attributed to her injury. She has not sustained any psychological, behavioral or characterological problems, but if so, the problems would be attributable to preexisting personality factors. Finally, she determined claimant does not require any further psychological or psychiatric treatment related to her work injury. Dr. Keenan did not feel claimant had any psychological impairment related to her workers compensation accident.

Claimant met with James Eyman, Ph.D., for a court-ordered Independent Psychological Evaluation, on April 12 and 30, 2013. Dr. Eyman was asked to make necessary recommendations for psychological treatment and to supply a disability rating. Dr. Eyman opined there is no evidence that claimant is malingering. Additionally, past psychological evaluators found claimant to be both mildly anxious and depressed, but not suffering from any psychological problems due to her injury. He determined claimant does not currently meet the diagnostic criteria for any psychological disorder. Plus, the criterion for an adjustment disorder were not present as claimant's disorder is not in excess of what would be expected due to her injury. Claimant's psychological symptoms do not significantly impair her functioning. Ultimately, Dr. Eyman found claimant to have injury and pain in her upper extremity from work, with expected reactions to psychological stressors. He felt that the cause of claimant's stress is the work injury. Dr. Eyman did not

find claimant was depressed at the time he met with her and he found no evidence of malingering.

Dr. Eyman noted the 4th ed. of the *AMA Guides* uses four categories of impairment when assessing mental health. These include “Activities of Daily Living.” Dr. Eyman found claimant capable of carrying out the activities of daily living. The second criteria involves “Social Functioning.” In this area, Dr. Eyman found that claimant interacts appropriately and communicates effectively with others and has no impairment. The third area involves “Concentration, Persistence and Pace.” Dr. Eyman found claimant to have no impairment related to these, as claimant is able to attend and complete tasks and interact with co-workers and supervisors. The fourth area involves “Deterioration or Decompensation in Work Settings.” Here, again, Dr. Eyman found claimant capable of adapting to stressful work situations, and she was able to make decisions, complete tasks and interact with co-workers and supervisors.

He opined that overall claimant does not have an impairment based on the fourth edition of the *AMA Guides*. However, under the Second edition of the *AMA Guides*, claimant would have a 5 percent impairment for her work injury. He felt claimant would benefit from behavioral pain management to learn ways to lessen the severity of her pain.

Claimant was evaluated by vocational expert Mike Dreiling, who opined claimant was capable of engaging in labor in the open labor market. Mr. Santner was unable to provide an assessment of claimant’s ability to work in the open labor market as, at the time of his evaluation, he had been provided no specific work related restrictions on claimant.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant’s right to an award of compensation and to prove the various conditions on which the claimant’s right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.²

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

The credible evidence in this record proves claimant suffered injuries to her left upper extremity. Claimant's physical injuries are limited to the upper extremity, with no proven injury to the left lower extremity.

K.S.A. 44-510e (Furse 2000) defines functional impairment as:

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.³

Both Dr. Bieri and Dr. Prostic provided ratings to claimant's left upper extremity. The ALJ found both credible, and, after averaging the ratings, found claimant had suffered a 40 percent functional impairment to the left upper extremity at the level of the arm. The Board agrees, and affirms.

Next the Board must address claimant's contention that she has suffered psychological damage resulting from this arm injury and the subsequent medical treatment associated with it.

As set forth in *Love*,⁴ the following three elements must be met for a traumatic neurosis claim to be compensable:

1. A physical injury;
2. Symptoms of traumatic neurosis; and
3. These symptoms are directly traceable to the physical injury.⁵

Dr. Barnett found claimant to have suffered a 30 percent psychological impairment from her work-related accident. This rating was pursuant to the *AMA Guides*, Second edition. However, neither Dr. Keenan, nor Dr. Eyman, the court-ordered psychological evaluator found claimant to have suffered any permanent psychological impairment from the left upper extremity injury. The Kansas legislature has mandated that any impairment under the Kansas Workers Compensation Act is to be determined pursuant to the Fourth edition of the *Guides*, if the impairment is contained therein. Dr. Eyman determined that, under the *Guides*, Fourth edition, claimant would have no impairment. Dr. Barnett's use of the Second edition violates the above legislative mandate. Additionally, based upon the

³ K.S.A. 44-510e(a) (Furse 2000).

⁴ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

⁵ *Id.* at 398.

opinions of Dr. Keenan and Dr. Eyman, claimant has failed to prove a connection between her alleged psychological impairments and the work injury.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has suffered a 40 percent functional impairment to her left upper extremity at the level of the arm. Claimant has failed to prove an impairment to her left lower extremity, or for psychological damage stemming from the work-related accident on March 20, 2009.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 6, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

BOARD MEMBER

BOARD MEMBER

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Brad E. Avery, Administrative Law Judge